

### **Investigations and Weingarten Rights**

#### **References:**

Chapter 71 of Title 5, United States Code, “The Federal Service Labor-Management Relations Statute”

Federal Labor Relations Authority Decisions

Court Decisions

#### **Purpose:**

The purpose of this guide is to review a bargaining unit employee’s Weingarten rights during agency investigations and the union’s role during such investigations. The guide highlights the elements that must be present for an employee’s Weingarten rights to be applicable.

#### **Background:**

5 U.S.C. 7114(a)(2)(B) provides that “an exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation if – (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.”

The Statute tracks the representational rights first established by the National Labor Relations Board (NLRB) and confirmed by the Supreme Court in a private sector decision in NLRB v. Weingarten, Inc., 420 U.S. 251 (1975).

#### **Federal Labor Relations Authority Decisions**

##### ***Four Conditions Must Be Met:***

The Authority’s analysis of the Statute reveals that four conditions must be met before vesting an employee with the 5 U.S.C. 7114(a)(2)(B) right to union representation. First, the meeting between agency management and the bargaining unit employee must constitute an “examination.” Second, the examination must be in connection with an

investigation. Third, the employee must reasonably believe that discipline could result from the meeting. And, fourth, the employee must request representation. See AFGE, Local 2366 vs. INS, U.S. Border Patrol, 46 FLRA No. 31 (October 28, 1992).

### ***Conditions One and Two – Examination in Connection With an Investigation***

Merriam Webster's Collegiate Dictionary, Tenth Edition, 1997, defines "examination" as follows: "*the act or process of examining; the state of being examined; a formal interrogation.*" The term "examine" is defined as follows: "*to inspect closely; to inquire into carefully; INVESTIGATE; to interrogate closely.*"

The legislative history of how the term "examination" became a part of the Statute is obscure. The Authority does seem to give a broad definition to the term. For a discussion on the legislative history, see AFGE, Local 3696 vs. Justice, Bureau of Prisons, 14 FLRA No. 59 (April 26, 1984). In any case, what constitutes an examination has evolved through case law on a case-by-case basis. Some examples are:

- Conversations that evolve into questions concerning an employee's duties or employment qualify for examination status. In this case, an employee was interrogated concerning the employee's whereabouts on the previous day and his activities – all in conjunction with an investigation as to the employee's misuse of official time. See AFGE, Local 1501 vs. Social Security Administration, 19 FLRA No. 93 (August 15, 1985).
- If an agency representative seeks information and an explanation from an employee concerning statements previously made by the employee, this constitutes an examination. This was an examination because the agency was seeking this information to determine if misconduct occurred and whether such misconduct warranted discipline. See AFGE, Local 3148 vs. Justice, Bureau of Prisons, 27 FLRA No. 97 (June 29, 1987).
- A requirement by management for an employee to prepare a written memorandum in connection with an investigation, setting forth the employee's version of an incident, constitutes an "examination" of an employee. The written memorandum was an examination as it was designed to elicit information and have the employee explain his conduct. See AFGE, Local 2366 vs. INS, U.S. Border Patrol, 46 FLRA No. 31 (October 28, 1992).
- Meetings conducted for the sole purpose of, and limited to, informing an employee of a decision already reached by the agency are **not** examinations. See AFGE, Local 1138 vs. Wright Patterson Air Force Base, 9 FLRA No. 117 (August 5, 1982).

- A meeting called by management to tell an employee not to repeat misconduct was **not** an examination. It was **not** designed to ask questions, elicit additional information, have the employee admit his alleged wrongdoing, or explain his conduct. See NTEU vs. IRS, 15 FLRA No. 78 (July 24, 1984).
- Discussions concerning an employee's performance are **not** examinations in connection with investigations. See NTEU, Chapter 24 vs. IRS, 5 FLRA No. 53 (March 30, 1981).

### ***Condition Three – Reasonable Belief Standard***

- In AFGE, Local 2544 vs. FLRA, 779 F.2d 719 (December 24, 1985), the D.C. Circuit Court of Appeals accepted the Authority's standard for determining "reasonable belief." The Court noted that:

*"The FLRA has consistently interpreted 7114(a)(2)(B) to say that a right to union representation exists whenever the circumstances surrounding an investigation make it reasonable for the employee to fear that his answers might lead to discipline. The possibility, rather than the inevitability, of future discipline determines the employee's right to union representation. Thus, for example, a union has a right to represent an employee even if the employer does not contemplate taking any disciplinary action against the employee at the time of the interview, since disciplinary action will rarely be decided upon until after the results of the inquiry are known.*

*The FLRA has also defined the 'reasonable believes' requirement in 7114(a)(2)(B) as an objective standard. The relevant inquiry is whether, in light of the external evidence, a reasonable person would decide that disciplinary action might result from the examination."*

[NOTE: This decision by the D.C. Circuit was on appeal from AFGE, Local 2544 vs. Justice, INS, 15 FLRA No. 80 (July 24, 1984). While upholding the Authority's "reasonable belief" standard, the Court ruled that the evidence in this particular case did not support the Authority's conclusion that the employee could not have reasonably believed that disciplinary action might result from the interview. The Court remanded the case back to the Authority, which adopted the Court's opinion as law in AFGE, Local 2544 vs. Justice, INS, 21 FLRA No. 33 (April 7, 1986).]

Even if an examination concerns an investigation of another party, this does not necessarily eliminate the risk that the employee being interviewed (and is not the subject of the investigation) might not be placed in jeopardy as a consequence of something he or

she has said to investigators. In this particular case, an employee being interviewed had some information that may have incriminated another employee. While the employee being interviewed was not the subject of the investigation, the employee reasonably believed his answers could have subjected him to disciplinary action. See NTEU vs. IRS, 4 FLRA No. 37 (September 26, 1980), *affirmed* IRS vs. FLRA, 671 F.2d 560 (D.C. Circuit 1982).

#### ***Condition Four – Need to Request a Representative***

- The right to union representation attaches only if an employee makes a valid request for union representation. To be valid, a request need not be made in a specific form. Instead, a request for union representation must be sufficient to put the employer on notice of the employee's desire for representation. See Tidewater Virginia Federal Employees Metal Trades Council vs. Norfolk Naval Shipyard, 35 FLRA No. 116 (May 10, 1990).
- The Statute does not require the employer to advise the employee during each investigation of his right to a union representative. An annual notice of that right meets the statutory obligation to advise employees of this right. See 5 U.S.C. 7114(a)(3). See also Sears vs. Navy, 680 F.2d 863 (1<sup>st</sup>. Circuit, 1982). However, nothing precludes the parties from contractually agreeing to provide an employee a notice during each investigation. Check your collective bargaining agreement for any agreement which goes beyond the statutory notice requirement.
- For a discussion on the legislative history concerning the notice requirement, see AFGE, Council of Prison Locals, Local 2052 vs. Federal Prison System, Federal Correctional Institution, Petersburg, Virginia, 25 FLRA No. 16 (January 15, 1987).

#### **Other Relevant FLRA Cases**

##### ***Delay of Investigation***

- Once an employee makes a valid request for union representation, the burden shifts to the employer to: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. See AFGE, Local 3148 vs. Justice, Bureau of Prisons, 27 FLRA No. 97 (June 29, 1987).
- While the employer and the union must act reasonably to accommodate the request of an employee for union representation, the employer need not unduly delay an investigation until an employee's chosen representative is available.

However, each situation must be looked at on a case-by-case basis as the Authority has stated that it is “unwilling to conclude that there is never any obligation to postpone a Weingarten interview merely because a specific union representative is not available.” In this particular case, the chosen union representatives had advance notice of the examination but elected to perform other representational duties at that time. See AFGE, Local 1917 vs. INS, 46 FLRA No. 114 (January 15, 1993).

### ***Role of the Union Representative during the Examination***

- The employer has no duty to bargain with the union representative at an investigatory interview. The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that it is only interested, at that time, in hearing the employee’s own account of the matter under investigation. See NLRB vs. Weingarten, Inc., 420 U.S. 251 (1975).
- A union representative may take an active role in assisting a unit employee in presenting facts in his or her defense. This right includes not only the right to assist the employee in presenting facts, but also the right to consult with the employee. However, any right for an employee and union representative to confer privately outside an interview room depends upon whether it is reasonably necessary to do so in order to ensure active and effective union representation. See AFGE, Local 171 vs. Bureau of Prisons, 52 FLRA No. 43 (October 23, 1996).
- The right of a union representative to take an active part in an examination includes having questions to employees clarified prior to answering. See NTEU vs. U.S. Customs Service, 5 FLRA No. 41 (March 19, 1981).
- The employer has a “limited” right to regulate the role of the union representative, limited to a reasonable prevention of an adversarial confrontation with the union representative. See Tidewater Virginia Federal Employees Metal Trades Council vs. Norfolk Naval Shipyard, 9 FLRA No. 55 (July 16, 1982).

✈ Our colleagues with the Air Force Central Labor Law Office offer the following suggestions concerning the union’s role in investigatory examinations:

*Experienced investigators suggest preventing problems by advance planning. It is a good idea to discuss the union representative’s role with him or her before the interview, out of the employee’s presence. The discussion should convey the investigator’s understanding of the representative’s role in protecting the employee’s rights. The investigator’s plan for breaks, conferences, etc. should*

*also be explained, and procedural questions invited and answered. By laying out the ground rules up front, the investigator establishes that he or she is knowledgeable about the employee's rights, and in control of the interview. In that overall context, the investigator can stress the need to hear the employee's own account without being adversarial. Some investigators will also set up the interview room so the representative's chair is close enough for true consultation, but behind the employee. This discourages the employee from turning constantly to the representative, and encourages the employee to proceed with his or her own answers unless there is a specific reason to consult, or the representative speaks up.*

### ***Criminal Investigations***

- Weingarten has been found to apply to requests by an employee for union representation at an examination by an agency representative in connection with a criminal investigation. See NTEU vs. IRS, 23 FLRA No. 108 (October 31, 1986). For purposes of the Department of Defense, your security police or military police could be considered representatives of the agency in conducting criminal investigations.
- However, consult with your attorneys for any exceptions. 5 U.S.C. 7103(b)(1) allows the President, by Executive Order, to exempt any agency, or part of an agency, from the Federal Service Labor Management Relations Statute if he determines that it has as a primary function intelligence, counterintelligence, investigative, or national security work and the application of the Statute would be unduly disruptive. For example, the Air Force Office of Special Investigations (OSI) is exempt from the Statute by Executive Order 12171. In a non-precedential setting decision, an Administrative Law Judge (ALJ) of the FLRA determined "as OSI is excluded from coverage under the Statute, because the Statute cannot be applied to those agencies or subdivisions in a manner consistent with national security requirements and considerations, the requirements of § 7114(a)(2)(B) may not be imposed on OSI." See AFGE, Local 1592 vs. Odgen Air Logistics Center, ALJ DE-CA-60922 (October 9, 1997). This means that the ALJ determined that OSI was not obligated to honor an employee's request for representation during a criminal investigation as the Statute, including Weingarten, is not applicable to the OSI. It is important to stress that the OSI was acting under its independent mandate to conduct criminal and security investigations. Any attempt by an activity to conduct a joint examination with the OSI or requesting the OSI to conduct the investigation on behalf of the activity may ensure that the employee is entitled to union representation under Weingarten. Like the Air Force OSI, certain other organizations in the Department of Defense may be exempt from coverage under the Statute. We recommend that you be very cautious in how you deal with such matters.

- In order to remove an employee for failure to answer potentially self-incriminating questions in an investigation, an agency must have advised the employee that (1) his or her refusal to answer may result in removal, and (2) any statement he or she may make will not be used against him or her in a criminal proceeding. See Weston, Ruby vs. HUD, 14 MSPR 321 (January 7, 1983). See also Kalkines vs. U.S., 473 F.2d 1391 (Cl. Ct. 1973).

### ***No Fibs by Feds***

- However, the belief that answering investigatory questions might lead to criminal prosecution does not entitle an employee to lie. In LaChance v. Erickson, 522 U.S. 262 (1998), the Supreme Court ruled that neither the Due Process Clause of the Constitution nor the Civil Service Reform Act preclude a Federal agency from sanctioning an employee for making false statements to the agency regarding alleged employment-related misconduct on the part of the employee. The Court noted that “[o]ur legal system provides methods for challenging the Government’s right to ask questions – lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.” The Court further noted that an employee could exercise his or her right to remain silent if answering an agency’s investigatory questions could expose the employee to criminal prosecution, noting, however, that an agency might well take into consideration the employee’s failure to respond in determining the truth or falsity of the charges.

### ***Inspector General Investigations***

- Office of Inspector General agents are representatives of the agency for purposes of Weingarten under 5 U.S.C. 7114(a)(2)(B). See NASA et al. vs. Federal Labor Relations Authority, Supreme Court, No. 98-369 (June 17, 1999).

### ***Weingarten Violation Remedies (two examples)***

- In a recent unfair labor practice decision, to remedy violations of employees’ Weingarten rights, the Authority ordered a nationwide posting at the employer’s facilities. The FLRA determined that the employer’s disregard for Weingarten rights, was important “...to unit employees well beyond the facility where the violations occurred...and that a unit-wide posting would indicate to all unit employees that their Weingarten rights will be vigorously enforced, and that the employer recognizes and intends to fulfill its obligations under the Statute.” The Authority also ordered that the investigative interview of the employee be repeated “at the request of the union and the employee,

with appropriate union representation, and that the disciplinary action previously taken against the employee be reconsidered based on information obtained in the new interview without reference to or reliance on information obtained in the previous interview.” In addition, the FLRA ordered that the employee be “made whole for any losses suffered to the extent consistent with the decision by the employer on reconsideration, and be afforded grievance and arbitration rights to which the employer was entitled.” See AFGE Council of Prison Locals vs. Federal Bureau of Prisons, 55 FLRA No. 64 (April 29, 1999)

- In AFGE, Local 2313 vs. Bureau of Prisons, Safford, AZ, 35 FLRA No. 56 (April 6, 1990), the Authority required the employer to repeat the examination and to reconsider a disciplinary action taken against the employee. The remedy was intended to "recreate the conditions and relationships that would have been had there been no unfair labor practice...by (1) affording that employee the protections that section 7114(a)(2)(B) is intended to provide--the assistance of a knowledgeable union representative in the interview and, as appropriate, in any subsequent proceedings; (2) providing the employee with the opportunity for redress for any tangible harm, such as an unjust disciplinary action, that the employee may have suffered as a consequence of the original denial of rights under section 7114(a)(2)(B); and (3) promoting employee confidence in the rights and procedures established by the Statute. Additionally, this remedy will deter violations of section 7114(a)(2)(B). By making the right to representation ultimately inescapable, this remedy will provide an additional incentive to agencies to afford representation rights and diminish any advantage to denying the right at the outset.”

#### ***Interviews of Witnesses in Preparation for Hearings before Third-Party Adjudicators***

- Some employees may be interviewed by agency representatives in preparation for hearings before third-party adjudicators after the agency has already completed its underlying investigations. While this is most likely a formal discussion situation, not Weingarten, it is important to note that the Authority has ruled that an agency may not conduct such fact gathering without limitation. The Authority has ruled, where management exercises its right to interview unit employees in preparation for third-party hearings, “that (1) management must inform the employee who is to be questioned of the purpose of the questioning, assure the employee that no reprisal will take place if he or she refuses, and obtain the employee’s participation on a voluntary basis; (2) the questioning must occur in a context which is not coercive in nature; and (3) the questions must not exceed the scope of the legitimate purpose of the inquiry or otherwise interfere with the employee’s statutory rights.” See Internal Revenue Service, Brookhaven Service Center and National Treasury Employee Union, 9 FLRA No. 132 (August 16, 1982).



## **Conclusions**

When there is doubt whether an employee is entitled to union representation when being questioned by management officials, managers should consult with a labor relations specialist. If management objects to union representation during such examinations, management always has the option of having no interview at all with the employee. However, this may place limits on how much information management is able to gather during its investigation. Such decisions should be made on a case-by-case basis depending on the nature and sensitivity of the matter being investigated.

If you have any questions concerning this reference guide, please contact the Field Advisory Services, Labor Relations Team, at (703) 696-6301, Team 3. Our DSN is 426-6301.